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STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Bob Holden, Governor • Stephen M. Mahfood, Director

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MEMORANDUM

DATE: OCT 15 2004

TO: John Balkenbush
Hazardous Waste Program

FROM: Kara V. Valentine, Legal Counsel
Air and Land Protection Division

SUBJECT: TRDG and Emergency Rules

ISSUE: If the RBCA cleanup numbers are promulgated as a rule, and those numbers later need to be revised due to changes in scientific data (such as toxicity, solubility or transport), can DNR readily change those numbers by emergency rule?

ANALYSIS: An emergency rule circumvents the normal public participation process. Such a rule becomes effective within 10 days of filing with the Secretary of State. However, an emergency rule is only in effect for a limited amount of time (the longer of 180 calendar days or 30 legislative days) and cannot be renewed. Typically, the state agency needs to adopt an identical rule under normal rulemaking procedures.

Under Section 536.025, DNR is authorized to make, amend, or rescind an emergency rule only if DNR finds one of the following:

- 1) an immediate danger to the public health, safety or welfare requires emergency action, OR
- 2) the rule is necessary to preserve a compelling governmental interest that requires an early effective date

There is no case law directly on the issue of whether changes in cleanup levels can be made through an emergency rule, and in the past 10 years, only approximately 20 DNR rules have been promulgated as emergency rules. Some of those rules took on an "emergency" nature in light of a change in federal rules tied to a loss of federal funding if DNR didn't follow

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suit in changing state rules. Some of the DNR emergency rules relate to DNR giving funds to third parties, as well as implementing the vehicle inspection and maintenance program in St. Louis. Five emergency rules were promulgated in 1995 relating to PSTIF, and were used to clarify significant regulatory issues, such as who the petroleum transport load fee is assessed against, which UST's are eligible for participation in PSTIF, and the process by which costs are evaluated for preapproval for the purpose of making claims for reimbursement from PSTIF.

As far as I can tell, none of these DNR emergency rules were challenged for being outside the scope of an emergency rule. It's important to note that emergency rules are subject to challenge, and that if a court finds that the rule should not have been adopted an emergency rule, then the party challenging the rule is entitled to reasonable fees and expenses in bringing the challenge, including any fees for experts or attorneys. Section 536.025.10 and .11. This means that if DNR adopts a change to the cleanup levels through an emergency rule and a court later decides DNR didn't meet the standard for an emergency, then DNR has to pay the legal costs of the person bringing the challenge.

There are no court decisions that discuss the standard for emergency rules. The few decisions in this area are cases where emergency rules were challenged for some other reason, but the decisions are helpful to show the kind of rules that have been adopted as emergency rules. For example, the Department of Social Services adopted as an emergency rule a new method of calculation per diem rates to be paid to nursing homes participating in the Medicaid program, justifying an emergency rule as "necessary to avoid jeopardizing funding available for all Medicaid recipients." *Rolla Manor v. Missouri Department of Social Services*, 865 S.W.2d 812, 816 (1993). The Department of Health promulgated an emergency amendment related to admissibility of breathalyzer test results into evidence; the emergency version did away with a detailed "certificate of analysis" required in a previous rule. *Blechle v. Director of Revenue*, 11 S.W.3d 655, 657 (1999). Again, neither of these cases involved a challenge to the state agency adopting the rules as emergency rules.

What it comes down to is that DNR has to justify one of the two rationales above to change the cleanup levels by emergency rule. If the change results in a less stringent standard, then it's impossible to argue there is an "immediate danger" justifying an emergency rule. As far as test 2, a "compelling governmental interest" hasn't been defined in the context of emergency rules, but DNR might argue that promoting quick and efficient cleanups to get sites back into productive use is a compelling government interest.

Emergency rulemaking should not be viewed as providing the flexibility allowed by a guidance document, as discussed below. Instead, emergency rulemaking is intended to temporarily allow an expedited rule where "immediate danger" or a "compelling governmental interest" trumps the delay that comes from the front-end public notice and comment process required by non-emergency rulemaking; the public notice and comment process is merely postponed for a certain period of time.

Unfortunately, there are no clear-cut answers on the success of an emergency rule; it depends on the modification made and DNR's stated rationale for that change.

Rules v. Guidance

On a related note, I was asked to list some of the pros and cons depending on if RBCA is ultimately formalized in rules or guidance. Generally speaking, the rules versus guidance debate is a trade-off between enforceability and flexibility.

Advantages of Rules

- 1) added input from wider public participation mandated by Chapter 536
- 2) putting the public on notice through rules increases the level of due process
- 3) adopting rules means that DNR avoids a legal challenge that the guidance should have been promulgated as a rule (see AAG Tim Duggan's memo on this topic)
- 4) rules are generally viewed as more enforceable or binding than guidance

Disadvantages of Rules

- 1) because of the public participation requirements, rules take a longer time to promulgate than simply relying on guidance
- 2) rules are more unwieldy to change or revise than guidance

Advantages of Guidance

- 1) quick to implement and revise

Disadvantages of Guidance

- 1) guidance is always subject to a legal challenge that the guidance should have been promulgated as a rule
- 2) there is some question about how binding guidance is on those DNR regulates
- 3) DNR loses the value of increased public input by using guidance rather than rules

This memo has been shared with Assistant Attorney General Tim Duggan who agrees with the conclusions. Please let me know if you have any further questions.

KLVB:bjc

c: Tim Duggan, AGO